IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1645

J. MICHAEL DONAHOE, et al.,

Appellants,

vs.

BEECH AIRCRAFT CORPORATION,

Appellees.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

A. OPINIONS BELOW

On February 6, 1974, judgment was entered by the Ninth Circuit Court of Appeals, affirming a United States District Court order, denying the appropriateness of this action as a class action under Federal Rules of Civil Procedure, Rule 23. A copy

of the District Court order is attached hereto as Appendix A. The Findings of Fact and Conclusions of Law entered in connection with the District Court order is attached hereto as Appendix B. The opinion of the Ninth Circuit Court of Appeals is attached hereto as Exhibit C.

On March 25, 1974, the Ninth Circuit Court of Appeals denied Petitioner's Application for Rehearing. A copy of the order is attached hereto as Appendix D.

B. JURISDICTION

Jurisdiction of this Court is invoked to review the Ninth Circuit Court of Appeal's order affirming the District Court's decision denying the suitability of this action for class action adjudication under Federal Rule 23, as well as the order of the Court of Appeals, denying Petitioner's Application for a Rehearing.

Jurisdiction of this Court to review by certiorari, the aforementioned orders is believed to be confirmed by 28 U.S.C. §1254 set forth in pertinent parts as follows:

"Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods: (1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;...."

The date of entry of judgment by the Ninth Circuit Court of Appeals was February 6, 1974. The date of order denying rehearing was March 25, 1974.

C. QUESTION PRESENTED FOR REVIEW

The sole question for review is whether the lower court and in turn the Ninth Circuit of Appeals was at all times material herein, without subject matter jurisdiction in this removed matter, in that the action does not involve the requisite jurisdictional amount in controversy between the parties as required by 28 U.S.C. §1332(a) and 28 U.S.C. §1441(a).

D. REFERENCES

1. 28 U.S.C. §1332;

2. 28 U.S.C. §1441;

3. 28 U.S.C. §1447;

4. Rule 23, Federal Rules of Civil Procedure;

5. California Code of Civil Procedure, §382.

The full text of these statutes are set forth in Appendix E, attached hereto.

E. STATEMENT OF THE CASE

On June 7, 1971, a complaint was filed in the Superior Court for the County of Los Angeles, State of California, by Fletcher Jones, alleging that Beech Aircraft Corporation had for approximately ten years known of a defect existing in the fuel system of certain subject aircraft and had for the ten year period embarked upon a scheme to conceal the defect from the Federal Aviation Administration and the general public. The complaint was on behalf of Mr. Jones himself and "all others similarly situated", as owners of the designated

aircraft, alleged to contain the defect in the fuel system. The complaint alleged that by reason of alleged fraud and deceit attendant to Beech's marketing and sale of these aircraft, that each member of the class be awarded approximately eight hundred dollars ($800.00) for the cost of repair of the defect as well as punitive damages for the sum of one hundred million dollars ($100,000,000.00) for the class as a whole.

The complaint further alleged that there were approximately fifteen thousand members who made up the class. The total aggregated amount in controversy was alleged to be in the sum of one hundred twelve million dollars.

Before answering the state court action, Beech petitioned the United States District Court, Central District of California, for a removal order under 28 U.S.C. §1441, alleging in this petition that the matter involved a controversy between residents of different states, and that the amount in controversy exceeded ten thousand dollars. The Petition for Removal was granted and the cause was removed to the United States

District Court.

Prior to any decision as to the suitability of the case for class action purposes, Fletcher Jones was killed in an aircrash. This event required the substitution of the named plaintiffs, and petitioner herein, Donahoe and McLeod, and an amended complaint reflecting this change in parties was filed with the District Court.

Thereafter the matter was decided by the District Court to be inappropriate for class action purposes under Federal Rule 23, and an order to that effect was entered on March 13, 1973.

The District Court then certified the case to be suitable for an interlocutory appeal under 28 U.S.C. §2092(b). Petitioners then petitioned the Ninth Circuit Court of Appeals for permission to file an interlocutory appeal and the petition was granted on April 5, 1973.

On February 6, 1974 the Court of Appeals affirmed the lower court's ruling and on March 25, 1974 denied petitioners' Petition for Rehearing.

F. FEDERAL JURISDICTION

The basis for Federal Court jurisdiction was alleged to be pursuant to 28 U.S.C. §1332. This allegation was made by Beech in their Petition for Removal under 28 U.S.C. §1441. Petitioner's do not agree that there is a proper basis for Federal Court jurisdiction, and that the allegations contained in Beech's Petition for Removal were erroneous. This is the error that is sought to be reviewed by this petition.

G. ARGUMENT WHY CERTIORARI SHOULD BE GRANTED

Petitioners urge that this Court grant their petition for review of the proceedings below, for the reason that neither court had subject matter jurisdiction over this proceeding.

The requirements of presenting a Federal question under 28 U.S.C. §1332, in class action matters have been the subject of review by two recent decisions of this Court. The decisions of Snyder v. Harris, 394 U.S. 332 (1969) and Zahn v.

International Paper Co., ___ U.S. ___, 42 L.W. 4087 (1973), hold that the jurisdictional minimum of ten thousand dollars in diversity matters cannot be attained by the aggregation of all class member's claims, present or not present. Each class member must independently show that his claim meets the ten thousand dollar jurisdiction minimum. Where there is no showing that any claim meets the ten thousand dollar minimum, the cause must be dismissed or in a removed matter, the cause must be remanded to the state court where it originated. Givens v. W. T. Grant, 409 U.S. 56 (1972).

Petitioners submit that this action falls clearly within the guidelines as set forth above, and that by reason of the fact that none of the members who comprise this class, claim damages in excess of ten thousand dollars, the entire matter should be remanded to the state court. The Ninth Circuit's refusal to so order, petitioners submit, is in direct conflict with the decisions of this Court.

Petitioners first learned of the jurisdictional defects after the recent

decision of Zahn, supra, was published. Petitioners informed the Court of Appeals by way of Petition for Rehearing of their belief that this removed matter does not involve a federal question. Although the total claim for damages ($112,000,000.00) is large, so too is the class on whose behalf petitioners bring this action (15,000 potential member litigants). Although the complaint specifically alleges compensatory damages of $800 per litigant, the complaint only alleges the aggregate sum of $100,000,000.00 for the claim of punitive damages. If the aggregate punitive damage claim is broken down to represent each class member's individual claim, the figure obtained is only $6,666.00 per member. Add to this figure each member's compensatory damage claim of $800.00, and a figure of $7,466.00 is obtained, which represents each class member's total claim, against the defendant. A figure far below the $10,000 requirement in Federal class actions predicated upon diversity of citizenshipment, as announced in Zahn. Thus there is no federal jurisdiction in this matter and the proper procedure is to

remand the entire matter back to the State Court where it originated.

The lack of Federal jurisdiction runs to the core of any litigation in the Federal court system. Federal jurisdiction cannot be conferred by agreement of the parties nor can jurisdictional defects ever be waived. In fact this Court has stated that it is encumbent that any court, in any stage of the proceedings, decide the issue for itself. Mansfield, Coldwater and Lake Michigan Ry. Co. v. Swan, 111 U.S. 379, 4 S.Ct. 510, 28 L.ed. 462 (1884).

In Mansfield, supra, the Supreme Court on its own initiative raised the question of lack of Federal jurisdiction, in a removed action, on appeal on the merits of a judgment against the defendants. Justice Mathews speaking for the court had this to say at page 382 (111 U.S. 379, 382):

> "It is true that the plaintiffs below, against whose objection the error was committed, do not complain of being prejudiced by it; and it seems to be an anomaly and a hardship that the party at whose instance it was committed

should be permitted to derive an advantage from it; but the rule, springing from the nature and limits of the judicial power of the United States is inflexible and without exception which requires this Court, of its own motion, to deny its jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it."

The prejudice to Petitioners of being bound by a decision of the courts lacking

in jurisdiction cannot be overstated. It must be remembered that Petitioners did not originally file in Federal Court, but were removed there on petition by the defendant, Beech. Once in federal court, petitioners were put to the burden of establishing the appropriateness of this class action under Federal Rules of Civil Procedure, Rule 23. At the same time petitioners were denied the benefit of the procedural rules of the State of California, with respect to class actions embodied in California Code of Civil Procedure §382 and as interpreted by decisions of that State.

Daar v. Yellow Cab, 67 Cal.2d 695, 63 Cal.Rptr. 724, 433 P.2d 732 (1967) established the following rule with regard to the suitability of class actions brought under CCP §382. The trial court must answer the following two questions in the affirmative: Is there an ascertainable class? Is there a well defined community of interest in the questions of law and fact involved? In the recent decision of Vasquez v. Superior Court, 4 Cal.3d 800, 94 Cal.Rptr. 796, 484 P.2d 964, the California Supreme Court ruled that a consumer class action based upon common law fraud

could be maintained under CCP §382, the requirements of Daar, had been satisfied.

Comparing this procedural test of California with that of Federal Rule 23, in particular Rule 23(b)(3), the differences become readily apparent. To be required to meet the muster of Rule 23 in a case properly in Federal court is one thing. To be subjected to its vigorous requirements when not properly in Federal Court is another matter altogether.

CONCLUSION

For the reason that the District Court and Appellate Court were at all times without jurisdiction because of the improper removal, the cause having not fulfilled the requirements of 28 U.S.C. §1332, petitioners urge this Court grant their petition.

Respectfully submitted,

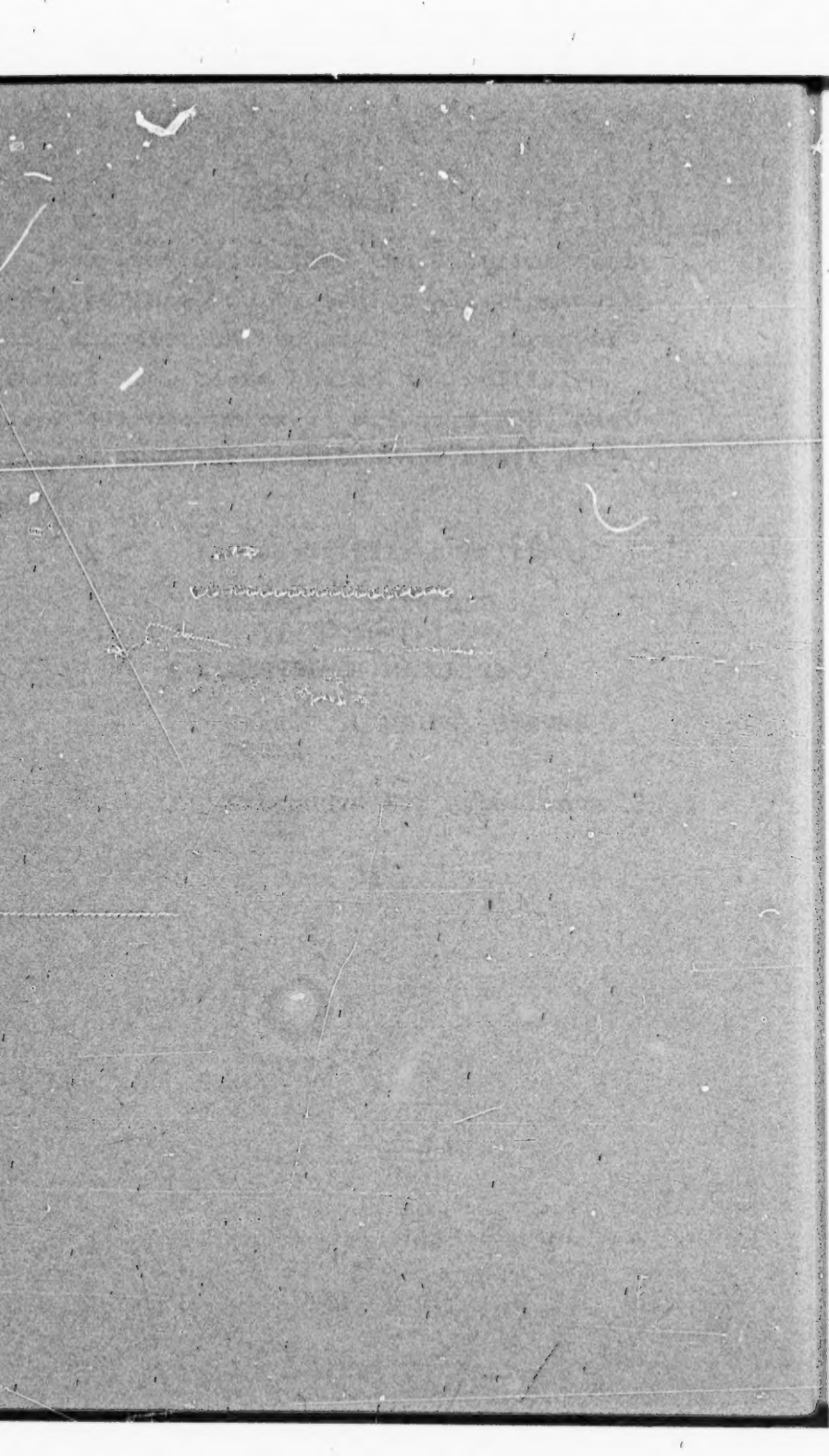
MAGANA & CATHCART
A Law Corporation

By: JAMES McCARTHY

WALKUP, DOWNING, STERNS & POORE

Attorneys for Appellants

APPENDIX A



APPENDIX A

Order Determining That Action May Not Be Maintained as a Class Action.

United States District Court, Central District of California.

Fletcher Jones, on behalf of himself and all others similarly situated, Plaintiff, v. Beech Aircraft Company, a corporation, and Does I to XX, inclusive, Defendants.

J. Michael Donahoe, *et al.*, Plaintiffs, v. Beech Aircraft Company, Defendant. No. 71-1558-MML.

Filed March 13, 1973.

On January 22, 1973, the motion of Beech Aircraft Corporation for an order pursuant to Rule 23(c)(1) declaring that the above-entitled action may not be maintained as class action came on for hearing. Sherman Welpton, Jr., and Robert Forgnone of Gibson, Dunn & Crutcher, and Robert Martin of Martin, Pringle, Schell & Fair appeared on behalf of defendant, Beech Aircraft Corporation. Daniel C. Cathcart of Magana & Cathcart appeared on behalf of plaintiffs.

The Court, having considered the briefs and evidence presented by the parties and heard argument of counsel thereon, has determined that this action is not appropriate for class adjudication under the criteria set forth in Rule 23, Federal Rules of Civil Procedure; that any questions of law and fact which may be common to the class do not predominate over questions affecting only individual members; that the action, if maintained as a class action, would be unmanageable; that a class action would not result in a fair and efficient adjudication of the controversy; and that a class

action would not result in economies of time, effort and expense.

Although there may be some issues common to the class, these issues are outweighed by the overwhelming number of individual issues which must be adjudicated as to each member of the alleged class; these individual issues affecting individual members will require substantial discovery and testimony from individual members of the class and would result in the trial of thousands of individual actions; accordingly, the claims or defenses of the representative parties are not typical of the claims or defenses of the class, a class action would not be superior to other available methods for the fair and efficient adjudication of the controversy, a class action would be unmanageable and would result in substantial prejudice to the rights of the parties herein.

THE COURT THEREFORE ORDERS, ADJUDGES AND DECREES, that defendant's Motion is granted and that this action may not be maintained as a class action.

IT IS FURTHER ORDERED, that plaintiff file an amended complaint deleting from his present complaint all allegations respecting the representation of absent parties.

DATED: March 13, 1973.

MALCOLM M. LUCAS
Judge
United States District Court
Central District of California

APPENDIX B

APPENDIX B

Findings of Fact and Conclusions of Law on Motion for Order Determining That Action May Not Be Maintained as a Class Action.

United States District Court, Central District of California.

Fletcher Jones, on behalf of himself and all others similarly situated, Plaintiff, v. Beech Aircraft Company, a corporation, and Does I to XX, inclusive, Defendants.

J. Michael Donahoe, Nelson J. MacLeod, on behalf of themselves and all others similarly situated, Plaintiffs, v. Beech Aircraft Company, Defendant. No. 71-1558-MML.

Filed March 13, 1973.

On January 22, 1973, the Motion of Beech Aircraft Corporation for an order pursuant to Rule 23 (c)(1) declaring that the above-entitled action may not be maintained as a class action came on for hearing.

The Court, having considered the brief and evidence presented by the parties and heard argument of counsel thereon, finds and concludes as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

1. This is a civil action filed by certain named Plaintiffs against Beech Aircraft Corporation, a Delaware corporation with its principal place of business located in the State of Kansas.

2. The original Complaint in this action was filed on June 24, 1971, in the Superior Court of the State

of California for the County of Orange. Subsequent thereto, the case was removed to this Court pursuant to 28 U.S.C. 1441 *et seq.*

3. The original Complaint in this action was filed by one Fletcher Jones, on behalf of himself and all others similarly situated. The original Complaint, as filed, alleged that Plaintiff Jones was a resident of the State of California.

4. Plaintiff Jones expired during the pendency of this action. Subsequent thereto, an amended Complaint was filed substituting in the place and stead of Plaintiff Jones, J. Michael Donahoe, an attorney and resident of the States of Oklahoma and Arizona, and Nelson J. MacLeod, an aircraft mechanic and resident of the State of Delaware.

5. The Plaintiffs in this action purport to represent all members of a class defined as all persons having owned certain designated aircraft manufactured by Defendant Beech Aircraft Corporation.

6. The Complaint alleges that certain designated models of aircraft manufactured by Defendant Beech Aircraft Corporation are defective in the design and construction of optional 40 gallon fuel systems. It is alleged that under certain circumstances of ground and flight operation, fuel in the system can move in a "spanwise" direction, uncovering the fuel outlet ports of the fuel cells and thereby allowing air to enter the fuel system causing a fuel starvation to the aircraft's engines and permitting engine stoppage.

7. The Complaint is framed in common-law theories of fraud and deceit. It is alleged that the Defendant certified the aircraft as "airworthy" and free from de-

fects with knowledge that "spanwise" displacement of fuel in the fuel system could occur. It is further alleged that the Defendant provided false and fraudulent information to the Federal Aviation Administration so as to obtain permission to manufacture the aircraft and to install thereon a "Certificate of Airworthiness".

8. The Complaint alleges that the named Plaintiffs and the members of the class relied solely on the "Certificate of Airworthiness" attached to the aircraft in purchasing and utilizing said aircraft.

9. Four separate aircraft models manufactured by Defendant Beech Aircraft Corporation are alleged to be defective. They are: (1) the Beechcraft Bonanza Aircraft, a single-engine, four-place metal aircraft, manufactured by Defendant Beech Aircraft Corporation continuously since 1946 and incorporating forty-gallon fuel cell systems as optional equipment since approximately 1960; (2) the Beechcraft Debonair Model Aircraft, a single-engine, four-place metal airplane, in continuous production since 1959 and incorporating as optional equipment forty-gallon fuel cell systems since 1961; (3) the Beechcraft Baron Aircraft, a twin-engine metal aircraft in continuous production since 1960 and incorporating as optional equipment forty-gallon fuel cell systems since 1960; (4) the Beech Travelair Model Aircraft, a twin-engine metal aircraft in continuous production from 1957 to 1968 and incorporating forty-gallon fuel cell systems as optional equipment from 1961 to 1968.

10. The Complaint alleges that Defendant has manufactured and sold approximately 9,000 Bonanza and Debonair aircraft. The Complaint further alleges that 6,000 Travelair and Baron aircraft have been manufactured and sold by Defendant.

11. Plaintiff Donahoe has owned two aircraft manufactured by Defendant Beech Aircraft Corporation and identified in the Complaint as being defective.

12. At the time of the filing of the Complaint, Plaintiff Donahoe was the owner of a Beechcraft Baron Model C-55, Serial No. TE-263, bearing FAA registration mark 4834J.

13. The Baron aircraft was purchased by Plaintiff Donahoe as a used aircraft. The chain of title of said aircraft, from its date of manufacture and first sale by Defendant Beech Aircraft Corporation, through the hearing of the motion herein is as follows:

Date	Seller	Purchaser	Residence of Seller	Residence of Purchaser
5/66	Beech Aircraft Corporation	Hartzog-Schneck Supply Inc.	Kansas	Illinois
5/67	Hartzog-Schneck	Calumet Aviation	Illinois	Indiana
6/67	Calumet-Aviation	Alloy Ring Service Inc.	Indiana	Ohio
1/70	Alloy Ring Service Inc.	Page Airways Inc.	Ohio	New York
1/70	Page Airways Inc.	Aero Auction Inc.	New York	Oklahoma
2/70	Aero Auction Inc.	J. Michael Donahoe	Oklahoma	Arizona
6/72	J. Michael Donahoe	Craig Heath	Arizona	Texas

14. Prior to the filing of the Complaint, Plaintiff Donahoe was the onwer of a Beech aircraft identified in the Complaint as being defective. Said aircraft was purchased by Plaintiff as a "used" aircraft and disposed of by plaintiff prior to the filing of the Complaint. This aircraft is a Model S-35 Beechcraft Bonanza, Serial No. D-7467, bearing FAA registration mark N 912 MD. The chain of title of said aircraft, from the date of manufacture and first sale by Defend-

ant Beech Aircraft Corporation through the hearing of the motion herein, is as follows:

Date	Seller	Purchaser	Residence of Seller	Residence of Purchaser
6/64	Beech Aircraft Corporation	Tex-Sun	Kansas	Texas
6/64	Tex-Sun	John P. Threadgill	Texas	Texas
6/68	John P. Threadgill	Jack Adams Aircraft Co. Sales Inc.	Texas	Miss.
6/68	Jack Adams Aircraft Co. Sales Inc.	Currey-Sanders Aircraft Co.	Miss.	La.
6/68	Currey-Sanders Aircraft Co.	J. Michael Donahoe	La.	Arizona
5/69	J. Michael Donahoe	Craig Heath	Arizona	Texas
11/72	Craig Heath	Bert Lisle	Texas	Texas
11/72	Bert Lisle	R. T. Ziembinski	Texas	Texas
1/73	R. T. Ziembinski	A. L. Pickens Co.	Texas	Kentucky

15. At the time of the filing of the Complaint, Plaintiff MacLeod was the owner of a Beech Model B-55 Baron aircraft, Serial No. TC-1059, bearing FAA registration mark N7130N. The aircraft was purchased by Plaintiff MacLeod as a "used" aircraft and the chain of title of said aircraft is as follows:

Date	Seller	Purchaser	Residence of Seller	Residence of Purchaser
1/68	Beech Aircraft Corporation	Atlantic Aircraft Sales Corp.	Kansas	Delaware
1/68	Atlantic Aircraft Sales Corp.	Air Kaman Inc.	Delaware	Connecticut
3/68	Air Kaman Inc.	Baldwin Enterprises, Inc.	Connecticut	Connecticut
6/68	Baldwin Enterprises, Inc.	Air Kaman Inc.	Connecticut	Connecticut
8/68	Air Kaman Inc.	Nelson J. MacLeod	Connecticut	Maryland

16. On the basis of the foregoing evidence, the Court finds that many of the aircraft identified as belonging to unnamed members of the class have been sold and resold on numerous occasions, that some of said aircraft were purchased as "used" aircraft by parties owning said aircraft on the date the Complaint was filed, and that some of the persons owning said aircraft on the date of the filing of the Complaint purchased said aircraft as a "new" aircraft.

17. Beech Aircraft Corporation denies all of the material allegations of the Complaint.

18. Since 1961, notices making reference to the operation, under certain conditions, of the forty-gallon fuel cell system installed in said aircraft have been sent by Defendant to various categories of persons owning, maintaining, or otherwise dealing with the aircraft which are the subject of the Complaint.

19. The Federal Aviation Administration has issued documents entitled Airworthiness Directives addressed to the registered owners of the aircraft identified in the Complaint, which Directives have as their subject matter the operation of the forty-gallon fuel cell system installed in said aircraft.

20. Notices from Beech Aircraft Corporation and/or the Federal Aviation Administration having as their subject matter the operation of the forty-gallon fuel cell system were issued by Beech or the Federal Aviation Administration on the following dates:

Date	Agency	Document	Aircraft Affected
4/65	Defendant	Service Letter	Bonanza
9/65	Defendant	Owners Manual	Bonanza
6/68	Defendant	Flight Manual	Baron
8/68	Defendant	Flight Manual	Baron
8/68	Defendant	Service Instruction	Baron
12/68	Defendant	Flight Manual	Baron
1/69	FAA	Airworthiness Directive	Baron
1/69	FAA	Airworthiness Directive	Baron
8/69	Defendant	Service Instruction	Bonanza
1/70	FAA	Airworthiness Directive	Bonanza
2/70	FAA	Airworthiness Directive	Bonanza
7/70	FAA	Airworthiness Directive	Baron
8/70	Defendant	Flight Manual	Baron
1/71	Defendant	Flight Manual	Baron
5/71	Defendant	Flight Manual	Baron
10/71	Defendant	Service Instruction	Baron
2/72	Defendant	Service Instruction	Bonanza
5/72	FAA	Airworthiness Directive	Bonanza
5/72	Defendant	Letter	Bonanza
5/72	FAA	Airworthiness Directive	Baron
5/72	Defendant	Letter	Baron
6/72	FAA	Airworthiness Directive	Baron
1/73	Defendant	Letter	Baron

The aforementioned notices are those affecting the aircraft models owned by the named Plaintiffs. Additional notices have been issued respecting other aircraft.

21. Individual issues exist with reference to each of the individual owners of Beech aircraft purported to be represented herein as to their information and knowl-

edge concerning the forty-gallon fuel cell system installed in their aircraft and the operation of said system under various conditions.

22. The transactions by which the named Plaintiffs, MacLeod and Donahoe, acquired their aircraft occurred outside the State of California and many of the transactions by which the unnamed owners, purported to be represented herein, acquired their aircraft occurred outside the State of California.

23. It will be necessary to determine as to each of the aforesaid transactions what state's law applies.

24. The class is so numerous and questions of law or fact so diverse that joinder of all members in a class action, or otherwise, is impracticable.

25. The claims or defenses of the representative parties are not typical of the claims or defenses of the class.

26. The prosecution of separate actions by or against individual members of the class would not create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; nor would the prosecution of separate actions by or against individual members of the class create a risk of adjudications with respect to individual members of the class which would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudication, or substantially impair or impede their ability to protect their interest.

27. Neither injunctive relief nor declaratory relief is requested in this action.

28. Common questions of law or fact, if any, do not predominate over questions affecting any individual members of the class.

29. Class adjudication of this controversy would not be superior to other available methods for the fair and efficient adjudication of the controversy.

30. There is no desirability of concentrating the litigation of these claims in this particular forum.

31. This action if maintained as a class action would be unmanageable.

32. This action if maintained as a class action would not result in a fair and efficient adjudication of the controversy.

33. This action if maintained as a class action would not result in economies of time, effort and expense.

34. This action is not appropriate for class adjudication under the criteria set forth in Rule 23 of the Federal Rules of Civil Procedure.

Conclusions of Law

1. In all respects as set forth in the foregoing Findings of Fact, which are hereby incorporated by reference.

2. Individual issues exist with reference to each of the individual owners of Beech aircraft purported to be represented herein as to their information and knowledge concerning the forty-gallon fuel cell system installed in their aircraft and the operation of said system under various conditions.

3. The transactions by which the named Plaintiffs, MacLeod and Donahoe, acquired their aircraft occurred outside the State of California and many of the trans-

actions by which the unnamed owners, purported to be represented herein, acquired their aircraft occurred outside the State of California.

4. It will be necessary to determine as to each of the aforesaid transactions what state's law applies.

5. The class is so numerous and questions of law or fact so diverse that joinder of all members in a class action, or otherwise, is impracticable.

6. The claims or defenses of the representative parties are not typical of the claims or defenses of the class.

7. The prosecution of separate actions by or against individual members of the class would not create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; nor would the prosecution of separate actions by or against individual members of the class create a risk of adjudications with respect to individual members of the class which would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudication, or substantially impair or impede their ability to protect their interest.

8. Neither injunctive relief nor declaratory relief is requested in this action.

9. Common questions of law or fact, if any, do not predominate over questions affecting any individual members of the class.

10. Class adjudication of this controversy is not superior to other available methods for the fair and efficient adjudication of the controversy.

11. There is no desirability of concentrating the litigation of these claims in this particular forum.

12. This action if maintained as a class action would be unmanageable.

13. This action if maintained as a class action would not result in a fair and efficient adjudication of the controversy.

14. This action if maintained as a class action would not result in economies of time, effort and expense.

15. This action is not appropriate for class adjudication under the criteria set forth in Rule 23 of the Federal Rules of Civil Procedure.

DATED: March 13, 1973.

/s/ Malcolm M. Lucas
Judge
United States District Court

APPENDIX C

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

U.S. COURT OF APPEALS

J. Michael Donahoe, et al.,

Plaintiffs-Appellants,

vs.

BEECH AIRCRAFT COMPANY,

Defendants-Appellees.

No. 73-1605

Appeal from the United States District Court for the Central District of California

Before: MERRILL and ELY, Circuit Judges, and ZIRPOLI, District Judge*

MEMORANDUM

Appellants and plaintiffs, J. Michael Donahoe and Nelson J. MacLeod, bring this interlocutory appeal under the provisions of 28 U.S.C. § 1292(b), from the March 13, 1973, order of the district court that the action could not proceed as a class action and striking the class action allegations from the complaint. Plaintiffs' petition for leave to file an interlocutory appeal was granted April 5, 1973.

The complaint in this action was originally filed June 7, 1971, in California state court by Fletcher Jones, a California resident, on behalf of himself and all other purchasers and/or owners of Beech Bonanza, Debonair, Travel Air, or Baron aircraft with forty gallon fuel cells. Appellee and defendant, Beech Aircraft Corporation, is a Delaware corporation engaged in the manufacture of private, military, and

* Honorable Alfonso J. Zirpoli, United States District Judge, Northern District of California, sitting by designation.

commercial aircraft with its principal place of business in Wichita, Kansas. The action was removed to federal court pursuant to 28 U.S.C. § 1441.

Following Jones' death an amended complaint was filed January 5, 1973, substituting Donahoe, an attorney and resident of Oklahoma and Arizona, and MacLeod, an aircraft mechanic and resident of Delaware, as plaintiffs. The class action allegations were amended to include all similarly situated owners of the four aircraft at the time of the filing of the initial complaint.

According to the complaint, the four aircraft models manufactured by Beech contained optional forty gallon fuel cells which were defective in design and construction, in that under certain circumstances of ground and flight operation, fuel in the cell can move in a "spanwise" direction, uncovering the fuel outlet ports of the cells and allowing air to enter the fuel system causing fuel starvation and consequent engine stoppage.

The complaint seeks compensatory damages for the cost of replacing the defective cells and punitive damages based on the common law theories of fraud and deceit. It is plaintiffs' contention that Beech certified the aircraft as "airworthy" and free from defects knowing that the "spanwise" fuel displacement could occur. They further contend that Beech provided false and fraudulent information to the Federal Aviation Administration to obtain permission to manufacture the aircraft and install in each aircraft a "Certificate of Airworthiness." Finally, they claim that the class members relied upon the airworthiness certificate in purchasing and using the aircraft, and that Beech has concealed the existence of the defects from the class members.

Rule 23(c)(1) of the Federal Rules of Civil Procedure

FYI-Readiness
2-19-73-10M-GHB

read in conjunction with the broad powers given the trial court in Rule 23(d) to fashion appropriate orders for the conduct of class actions indicate that the district court has the primary responsibility for determining the limits and course of actions brought under the rule. The need for restraint in reviewing orders of the district court due to the special knowledge that the trial court has concerning the practical and realistic problems presented by class actions is especially obvious here.

The district court issued its order some 21 months after the action was originally filed. Considerable discovery had taken place. In reaching its conclusion, the district court had the entire record of the proceedings before it and had to consider almost 300 pages of points and authorities and supporting affidavits.

Given these considerations, we are in agreement with the second circuit that where the trial court has made its determination of the class action issue, "the judgment of the trial judge should be given the greatest respect and the broadest discretion, particularly if . . .he has canvassed the factual aspects of the litigation." City of New York v. International Pipe & Ceramics Corp., 410 F.2d 295, 298 (2d Cir. 1969).

Therefore, when the court's findings and conclusions indicate that the appropriate criteria were applied to the facts of the case, its decision on the question of certification of the class action will not be disturbed on appeal unless the challenging party demonstrates that the court abused its discretion. Gold Strike Stamp Co. v. Christensen, 436 F.2d 791, 792-93(10th Cir. 1970). See also Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972); Hackett v. General Host Corp., 455 F.2d 618 (3d Cir. 1972); City of New York v. International Pipe & Ceramics Corp., supra.

The findings of fact and conclusions of law filed along with the district court's March 13, 1973, order demonstrate that the trial court did apply the correct criteria, and the finding that a class action may not be maintained was not an abuse of discretion.

In order to maintain a class action, all of the requirements of Rule 23(a) must be met, and in addition, the class action must come under one of the subdivisions of Rule 23(b), in this case section (b)(3). The burden is on the proponent of the class action, appellants here, to demonstrate that the separate requirements of Rule 23(a) and (b)(3) have been met. 3B Moore's Federal Practice ¶ 23.02, at 23-152 to 23-153 (2d ed. 1969); Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968).

The trial court found that neither subsection (a)(3) nor subsection (b)(3) of Rule 23 was satisfied. Specifically, the court determined that the claims of the representative parties were not typical of the claims of the class; that common quesitons of law or fact did not predominate over questions affecting any individual members of the class; and that class adjudication of this controversy would not be superior to other available methods for the fair and efficient adjudication of the controversy.

Each of these findings is based upon the trial court's conclusion that numerous transactions involving the individual aircraft that are the subject of the complaint will each involve separate determinations of the applicable state law, and that for each class member there are separate questions of their knowledge and information concerning the fuel system.

Based upon the specific findings of fact and conclusions of law of the court below, which we find to be amply supported by relevant data in the record made before the trial court,

we cannot say that these findings or any one of them are clearly erroneous, and based upon the criteria employed by the court below in appraising the propriety of entertaining the action as a class action, we cannot say that the court abused its discretion in any way. Accordingly, the order appealed from is affirmed.

FYI-Pendleton
3-19-71-1514-2366

APPENDIX D

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

J. MICHAEL DONAHOE, et al.,
Plaintiffs-Appellants,
vs.
BEECH AIRCRAFT COMPANY,
Defendants-Appellees.

No. 73-1605

ORDER

Before: MERRILL and ELY, Circuit Judges, and ZIRPOLI, District Judge

The petition for rehearing is denied.

FILED
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U. S. COURT OF APPEALS

APPENDIX E

1. 28 U.S.C. §1332
2. 28 U.S.C. §1441
3. 28 U.S.C. §1447
4. Federal Rule of Civil Procedure 23
5. California Code of Civil Procedure §382

APPENDIX E

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal

place of business: *Provided further*, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico, June 25, 1948, c. 646, 62 Stat. 930; July 26, 1956, c. 740, 70 Stat. 658; July 25, 1958, Pub.L. 85-554, § 2, 72 Stat. 415; Aug. 14, 1964, Pub.L. 88-439, § 1, 78 Stat. 445.

Historical and Revision Notes

Reviser's Note. Based on Title 28, U.S.C., 1940 ed., § 41(1) (March 3, 1911, ch. 231, § 24, par. 1, 36 Stat. 1091 [derived from R.S. §§ 563, 629; Mar. 3, 1875, c. 137, § 1, 18 Stat. 470; Mar. 3, 1887, c. 373, § 1, 24 Stat. 552; Aug. 13, 1888, c. 866, § 1, 25 Stat. 433]; May 14, 1934, c. 283, § 1, 48 Stat. 775; Aug. 21, 1937, c. 726, § 1, 50 Stat. 738; Apr. 20, 1940, c. 117, 54 Stat. 143).

Other provisions of said section 41(1) of Title 28, U.S.C., 1940 ed., are incorporated in sections 1331, 1341, 1342, 1345, 1354, and 1359 of this title. (See reviser's notes under said sections.)

Jurisdiction conferred by other sections of this chapter, except section 1335, is not dependent upon diversity of citizenship. (See annotations under former section 41 of Title 28, U.S.C.A. [now constituting this chapter and sections 1397, 1399, 2361, 2401 and 2402 of this title], and 35 C.J.S., p. 833 et seq., §§ 30-43. See, also, reviser's note under section 1331 of this title.) As to citizenship of bank where jurisdiction depends upon diversity of citizenship, see section 1348 of this title.

Words "all civil actions" were substituted for "all suits of a civil nature, at common law or in equity" in order to conform to Rule 2 of the Federal Rules of Civil Procedure.

Words "or citizens of the District of Columbia, Territory of Hawaii, or Alaska, and any State or Territory" which were inserted by the amendatory Act April 20, 1940, are omitted. The word "States" is defined in this section and enumeration of the references is unnecessary.

The revised section conforms with the views of Philip F. Herrick, United States Attorney, Puerto Rico, who observed that the Act of April 20, 1940, permitted action between a citizen of Hawaii and of Puerto Rico, but not between a citizen of New York and Puerto Rico, in the district court.

This changes the law to insure uniformity. The 1940 amendment applied only to the provision as to controversies between "citizens of different States." The new definition in subsection (b) extends the 1940 amendment to apply to controversies between citizens of the Territories or the District of Columbia, and foreign states or citizens or subjects thereof.

The diversity of citizenship language of said section 41(1) of Title 28, U.S.C., 1940 ed., as amended in 1940, was described as ambiguous in McGarry v. City of Bethlehem, 45 F.Supp. 385, 386. In that case the 1940 amendment was held unconstitutional insofar as it affected the District of Columbia. However, two other district courts upheld the amendment. Winkler v. Daniels, D.C.Va.1942, 43 F.Supp. 265; Glaeser v. Acacia Mutual Life Ass'n, D.C. Cal.1944, 55 F.Supp. 925.

This section is intended to cover all diversity of citizenship instances in civil actions in accordance with the judicial construction of the language in the original section 41(1) of Title 28, U.S.C., 1940 ed. Therefore the revised language covers civil actions between—

Citizens of a State, and citizens of other States and foreign states or citizens or subjects thereof;

Citizens of a Territory or the District of Columbia, and foreign states or citizens or subjects thereof;

Citizens of different States;

Citizens of different Territories;

Citizens of a State, and citizens of Territories;

Citizens of a State or Territory, and

Citizens of the District of Columbia;

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

June 25, 1948, c. 646, 62 Stat. 937.

Historical and Revision Notes

Reviser's Note. Based on Title 28, U.S.C., 1940 ed. §§ 71, 114 (Mar. 3, 1911, c. 231, §§ 28, 33, 36 Stat. 1091, 1101; Jan. 20, 1914, c. 11, 38 Stat. 278; Jan. 31, 1928, c. 14, § 1, 45 Stat. 54).

Section consolidates removal provisions of sections 71 and 114 of Title 28, U.S.C., 1940 ed., and is intended to resolve ambiguities and conflicts of decisions.

Phrases such as "in suits of a civil nature, at law or in equity," the words "case," "cause," "suit," and the like have been omitted and the words "civil action" substituted in harmony with rules 2 and 81(c) of the Federal Rules of Civil Procedure.

Ambiguous phrases such as "the District Court of the United States for the proper district" have been clarified by the substitution of the phrase "the district and division embracing the place where such action is pending." (See General Investment Co. v. Lake Shore & M. S. Ry. Co., 1922, 43 S.Ct. 107, 112, 260 U.S. 261, 67 L.Ed. 244 and cases cited therein.)

All the provisions with reference to removal of controversies between citizens of different States because of inability, from prejudice or local influence, to obtain justice, have been discarded. These provisions, born of the bitter sectional feelings engendered by the Civil War and the Reconstruction period, have no place in the jurisprudence of a nation since united by three wars against foreign powers. Indeed, the practice of removal for prejudice or local influence has not been employed much in recent years.

Subsection (c) has been substituted for the provision in section 71 of Title 28, U.S.C., 1940 ed., "and when in any suit mentioned in this section, there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States."

This quoted language has occasioned much confusion. The courts have attempted to distinguish between separate and separable controversies, a distinction which is sound in theory but illusory in substance. (See 41 Harv.L.Rev. 1048; 35 Ill.L.Rev. 576.)

Subsection (c) permits the removal of a separate cause of action but not of a separable controversy unless it constitutes a separate and independent claim or cause

Note 344

that action of federal court in Texas was based on defendant's contention; Civ. Code, La. art. 2291, being inapplicable. McLaughlin v. Western Union Telegraph Co., D.C.La.1925, 7 F.2d 177.

Opposing the appointment of a receiver does not waive the right to remove. Sidway v. Missouri Land, etc., Co., C.C.Mo. 1902, 116 F. 381.

Willingness to remain in state court for one cause of action does not show a willingness, or constitute a waiver, as to some different cause. Adams v. Western Steel Buildings, Inc., D.C.Colo.1969, 296 F.Supp. 750.

Defendant by filing its plea in abatement and its cross-action in Georgia court, which was not compulsory under Georgia law, waived defendant's right to remove the case to the federal court. Briggs v. Miami Window Corp., D.C.Ga. 1956, 158 F.Supp. 229.

Where action was commenced against two resident corporations and nonresident corporation, and action was dismissed as to two resident corporations, and attorney for nonresident corporation did not request removal of case at that time but waited until conclusion of plaintiff's opening statement before requesting removal, there was waiver of right of removal to federal court. Waldron v. Skelly Oil Co., D.C.Mo.1951, 101 F.Supp. 425.

Right to removal of condemnation proceeding to federal court after appeal to superior court was not waived by nonresident, by filing of exceptions to report of jury appointed by board of aldermen to assess damages; proceeding before appeal being administrative, and not "suit of civil nature." Town of Waynesville v. Smather, 1927, 138 S.E. 613, 194 N.C. 131.

The making and participating in the hearing of a motion to discharge a receiver does not amount to a waiver of the right to remove. Franklin v. Wolf, 1887, 3 S.E. 696, 78 Ga. 446.

§ 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

June 25, 1948, c. 646, 62 Stat. 939; May 24, 1949, c. 139, § 84, 63 Stat. 102; July 2, 1964, Pub.L. 88–352, Title IX, § 901, 78 Stat. 266.

Historical and Revision Notes

Reviser's Note. Based on Title 28 U.S.C. 1940 ed., §§ 71, 72, 74, 76, 80, 81 and 83 (Mar. 3, 1911, c. 231, §§ 28, 29, 31, 33, 37 and 38, 36 Stat. 1094–1098 [§ 71 derived from R.S. § 639; Acts Mar. 3, 1875, c. 137, § 2, 18 Stat. 470; Mar. 3, 1887, c. 373, § 1,

Rule 23. Class Actions.

(a) PREREQUISITES TO CLASS ACTION. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) CLASS ACTIONS MAINTAINABLE. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members

of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) DETERMINATION BY ORDER WHETHER CLASS ACTION TO BE MAINTAINED; NOTICE; JUDGMENT; ACTIONS CONDUCTED PARTIALLY AS CLASS ACTIONS.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) ORDERS IN CONDUCT OF ACTIONS. In the conduct of ac-

tions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) DISMISSAL OR COMPROMISE. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

History of Rule

[1]—General History.

Rule 23 stood as promulgated in 1937 until 1966 when it was completely revised. As a part of this revision the substance of original subdivision (b), *infra*, which dealt with the shareholder's derivative suit, was carried forward as Rule 23.1, *infra;* and provisions for class actions by or against representatives of an unincorporated association, which had been treated as true class actions, see ¶23.08, App., were carried forward as Rule 23.2, *infra*. ¶23.2.02.

Original Rule 23 was applicable to all civil actions whether formerly at "law" or in "equity". ¶23.02. And with the unification in 1966 of the civil and admiralty procedures, see Rule 1, *supra*, revised Rule 23 is applicable whether the claim or claims are legal, equitable, maritime, or a combination thereof. ¶23.02[2].

§ 382. Nonconsent to joinder as plaintiff; representative actions

If the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.

(Enacted 1872. Amended by Stats.1971, c. 244, p. 375, § 12, operative July 1, 1972.)

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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-1645

J. MICHAEL DONAHUE, *et al.*,

Petitioners,

v.

BEECH AIRCRAFT CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION.

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IN THE

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

The opinions below are adequately set forth in Appendix A through Appendix D of the Petition. The opinions below are not reported.

Jurisdiction.

Petitioners seek to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

Question Presented.

Is the $10,000 amount in controversy requirement of 28 U.S.C. § 1332(a) met in the instant controversy?

Statute Involved.

United States Code, Title 28:

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, . . .

Statement of the Case.

On June 7, 1971 a Complaint entitled "Complaint for Fraud and Deceit (A Class Action)" was filed in the Superior Court of the State of California by Fletcher Jones, on behalf of himself and all persons who have purchased and/or own or operate a Beech Bonanza, Debonair, Travel Air or Baron aircraft having installed therein forty-gallon fuel cells. [Clk. Tr., pp. 6-10.]

The Complaint alleged that respondent Beech Aircraft Corporation ("Beech") affirmatively misrepresented to the members of the alleged class that its Bonanza, Debonair, Travel Air and Baron models of aircraft incorporating unbaffled forty-gallon fuel cells systems were airworthy and concealed from the Federal Aviation Administration ("FAA") and the public generally, certain alleged deficiencies in the fuel system.[1] Compensatory damages claimed to be equal to the cost of replacing components of the fuel system were sought on behalf of the named plaintiff and the members of the purported class. In addition, punitive damages in the

[1]While proof on the merits is not the issue in this proceeding, Beech wishes to advise this Court that its aircraft are airworthy and safe, and that it has abundant proof that there was no concealment or misrepresentation, whether to the FAA or to anyone else.

sum of $100,000.000 were sought on behalf of the alleged class. [Clk. Tr., pp. 6-10.]

On July 2, 1971 Beech filed a verified Petition and a Bond for Removal pursuant to 28 U.S.C. § 1441 *et seq.*, and thereby removed this case to the United States District Court for the Central District of California [Clk. Tr., pp. 1-13], where it was assigned to District Judge Malcom M. Lucas. Beech's Petition alleged diversity of citizenship and an amount in controversy in excess of $10,000. [Clk. Tr., p. 2.]

On July 15, 1971 Beech filed its answer to plaintiff's complaint denying the material allegations thereof. [Clk. Tr., pp. 14-21.] Thereafter, the plaintiff pursued discovery from Beech. Plaintiff's discovery included five separate sets of interrogatories [Clk. Tr., pp. 26, 154, 169, 268, 352], several depositions and three requests for production of documents. [Clk. Tr., pp. 148, 411, 860.]

On September 1, 1972, fifteen months after the action was commenced, Beech moved the District Court for an order determining that the action could not be maintained as a class action and for an order requiring the plaintiff to file an amended complaint striking all allegations as to representation of absent parties. [Clk. Tr., pp. 907-908.] On September 14, 1972 plaintiff moved the Court for an order continuing the hearing on Beech's motion. [Clk. Tr., p. 937.] On September 18, 1972 the Court continued the date for hearing on Beech's motion to Monday, November 11, 1972.

On November 7, 1972 plaintiff Fletcher Jones met his death by accidental means and, thereafter, on November 15, 1972, pursuant to stipulation of the parties, the Court ordered all motions off calendar. [Clk.

Tr., p. 1298.] This temporary stay of proceedings was ordered to allow the parties time to consider the effect of plaintiff Jones' death on the status of the case. Thereafter, on December 11, 1972, at an in-chambers and unreported status conference, Judge Lucas granted the attorney representing the deceased plaintiff Jones and the alleged class permission to file an amended complaint substituting other parties in the place and stead of decedent Jones. Judge Lucas ordered that the hearing on defendant's motion be set for Monday, January 22, 1973.

Less than four weeks later, on January 5, 1973, attorneys for the deceased plaintiff Fletcher Jones filed an amended complaint[2] on behalf of petitioners herein, J. Michael Donahoe and Nelson J. MacLeod.

The amended complaint in substance alleged a class composed of all persons who on June 7, 1971 owned a Beech Bonanza, Debonair, Baron or Travel Air aircraft having installed therein 40-gallon unbaffled fuel cells.

The complaint further alleged "that jurisdiction herein is founded on diversity of citizenship between the parties *and the amount in controversy exceeds the sum of $10,000,* exclusively [sic] of any interest, costs and attorneys' fees" (Appendix AA, p. 1, emphasis supplied.)

In addition, the complaint alleged "that as a direct and proximate result of the defendant's conduct in the premises, plaintiffs and *each member of the class shall be entitled to recover punitive damages in the amount of $100,000,000* plus interest from the date of purchase

[2]The amended complaint is set out in full in Appendix AA, *infra.*

of each said aircraft embraced within the class" (Appendix AA, p. 6, emphasis supplied.)

On Monday, January 22, 1973 the Court heard argument on Beech's motion. On January 22, 1973 the District Court granted Beech's motion.

Thereafter, the District Court, on March 13, 1973, entered an order determining that this action might not proceed as a class action and further ordering petitioners to file an amended complaint deleting therefrom allegations as to representation of absent parties.[3] The District Court also made and entered Findings of Fact and conclusions of law on the motion[4] and entered an order certifying its order (denying petitioners the right to proceed with this action as a class action) for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

Petitioners thereafter petitioned the United States Court of Appeals for the Ninth Circuit for permission to file an interlocutory appeal, which petition was granted by the Ninth Circuit on April 5, 1973. Thereafter, an Appellants' Opening Brief was filed by the petitioners, which brief restricted itself to argument that the District Court improperly determined that this action was not appropriate for class adjudication. Beech then filed its Appellee's Brief arguing that the District Court properly determined that this matter was not appropriate for class adjudication.

On January 16, 1974 the matter was argued before Circuit Judges Merrill and Ely and District Judge Zirpoli sitting by designation. On February 6, 1974 the Ninth Circuit filed its opinion and judgment affirming

[3]The District Court's order of March 13, 1973 is set out in full in Appendix A of the Petition.

[4]The District Court's Findings of Fact and Conclusions of Law are set out in full in Appendix B of the Petition.

the District Court's order determining that this action is not appropriate for class adjudication and remanding the case to the District Court for further proceedings.[5]

Petitioners thereafter applied for a rehearing in the Ninth Circuit. Said application did not seek further review of the question of whether this action could properly be maintained as a class action, but instead raised for the first time their present contention that the federal courts at all times lacked subject matter jurisdiction in the within action. On March 25, 1974 the Ninth Circuit denied petitioners' application for rehearing.[6] This Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit followed.

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[5]The opinion and judgment of the United States Court of Appeals for the Ninth Circuit is set out in full in Appendix C of the Petition.

[6]The order of the United States Court of Appeals for the Ninth Circuit denying petitioners' application for rehearing is set out in full in Appendix D of the Petition.

ARGUMENT.

Petitioners' Petition ignores the fact that it is not the purpose and function of a writ of certiorari to give the defeated party in the Court of Appeals another hearing. As demonstrated below, this case is not an appropriate case for the granting of a writ of certiorari under the guidelines set forth in Rule 19 of the Supreme Court Rules. Moreover, the granting of the writ in this case would only serve to involve this Court in the resolution of what are essentially evidentiary questions.

I.

The Petition Should Be Denied on the Basis of Petitioners' Own Allegation of Federal Subject Matter Jurisdiction.

This action was filed on June 7, 1971 in the Superior Court of the State of California for the County of Orange. On July 2, 1971 it was removed by Beech to the United States District Court for the Central District of California. The grounds for removal stated in Beech's verified petition for removal were diversity of citizenship and an amount in controversy in excess of $10,000.

On July 15, 1971 Beech filed its answer to plaintiff's complaint. For the next 14 months plaintiff pursued discovery against Beech. Multiple sets of interrogatories, requiring thousands of separate responses and three requests for production of documents, which requested in total hundreds of pages of documents, were responded to by Beech. On September 1, 1972, 15 months after this action was filed, Beech moved the District Court for an order determining that this action was inappropriate for class adjudication.

While the motion was pending, the petitioners filed an amended complaint substituting themselves as plaintiffs of record. That complaint stated in clear and unequivocal language, *"jurisdiction herein is founded on diversity of citizenship between the parties and the amount in controversy exceeds the sum of $10,000 exclusively [sic] of any interest, costs and attorneys' fees"* (Appendix AA, p. 1, emphasis supplied).

Notwithstanding their clear and unequivocal allegation of federal subject matter jurisdiction, petitioners now raise, in this Court, a question as to the jurisdiction of the courts below. Regrettably they raise their objection after causing the District Court to consider almost 300 pages of points and authorities and supporting affidavits on Beech's class motion and after causing the Ninth Circuit to consider over 100 pages of briefs, to hear oral argument and to issue its opinion.

It is noteworthy that it was only after the Ninth Circuit had issued its opinion and judgment affirming the District Court's interlocutory determination that this is not a proper class action, that petitioners first disavowed their allegation that *"jurisdiction herein is founded on diversity of citizenship between the parties and the amount in controversy exceeds the sum of $10,000 exclusively [sic] of any interest, cost and attorney's fees"* (Appendix AA, p. 1, emphasis supplied).[7] Petitioners' purpose in doing so is obvious.

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[7]Petitioners weakly explain their delay by alleging that they did not learn of the alleged jurisdictional defects until "after the recent decision of *Zahn, supra* [*Zahn v. International Paper Co.*, ... U.S. ...., 38 L.Ed.2d 511 (1973)] was published (Petition, pp. 8-9)." However they argue that none of the alleged class members assert a claim in excess of $10,000 which, of course, brings the case under the rule enunciated by this Court in *Snyder v. Harris*, 394 U.S. 332 (1969). *Snyder* was decided two years before this case was filed and three years before petitioners filed their complaint alleging federal subject matter jurisdiction.

Petitioners wish an opportunity to reargue anew the question of the propriety of class adjudication of this case.

Petitioners, after utilizing many hours of the judicial time of an already strained federal judiciary on the basis of their own allegation of federal subject matter jurisdiction, now call upon the highest court of the nation to exercise its discretion to issue its writ. Under such circumstances, we submit, petitioners should be and are bound by their allegation of subject matter jurisdiction and the only proper action for this Court is to deny their Petition.

II.

The Petition Presents No Issue or Question of Such Public Interest as to Warrant the Exercise of This Court's Discretionary Jurisdiction.

The considerations which this Court utilizes in determining whether or not to exercise its discretionary jurisdiction are set forth in this Court's Rule 19(b). None of the considerations are applicable here and petitioners themselves do not urge that this case falls within the ambit of the rule.

A reading of the Petition makes it clear that the petitioners do not urge that the Ninth Circuit has rendered a decision in conflict with the decision of another circuit on the same matter, or that the Ninth Circuit had decided an important state or territorial question in a way in conflict with applicable state or territorial law. [Rule 19(b).]

The petitioners do not urge that the Ninth Circuit has decided an important question of federal law which has not yet been, but should be, settled by this Court, nor can they effectively argue that the Ninth Circuit

has decided a federal question in a way in conflict with applicable decisions of this Court.[8] Finally, the petitioners do not urge that the Ninth Circuit so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision. [Rule 19(b).]

The arguments advanced by petitioners in favor of the exercise of this Court's discretionary jurisdiction are unpersuasive. Petitioners' argue that the "requirements of presenting a federal question under 28 U.S.C. § 1332, class action matters have been the subject of review on two recent decisions of this Court." (Petition, p. 7.) The Petition further notes that *Snyder v. Harris*, 394 U.S. 332 (1969), and *Zahn v. International Paper Co.*, ... U.S. ...., ... L.Ed.2d ...., 42 L.W. 4087 (1973), hold that the jurisdictional minimum of $10,000 in diversity matters cannot be attained by the *aggregation* of all class members' claims, present or not present." (Petition, pp. 7-8.)

In *Snyder, supra*, this Court held that the claims of potential class members cannot be aggregated to meet the jurisdictional minimum of $10,000 in diversity actions. Similarly, in *Zahn, supra*, this Court held that the mere fact that one of many class members may have a claim in excess of $10,000, does not of itself

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[8]Petitioners suggest that, under the rule of *Zahn, supra*, the federal courts lacked subject matter jurisdiction and that, therefore, the Ninth Circuit's opinion affirming the District Court's interlocutory order departed from the opinions of this Court. However, the Ninth Circuit's opinion was only directed to the issue of class adjudication which, of course, was the only matter certified for interlocutory appeal by the District Court. Moreover, no explanation is given in the Petition as to why the Ninth Circuit should not have accepted as true petitioners' own allegation of federal subject matter jurisdiction.

grant to the federal judiciary power to adjudicate matters as to those claimants possessing claims of less than $10,000.

Petitioners do not seek a review or reanalysis of these decisions. The petitioners instead seek to have this Court apply its holding in *Zahn, supra,* and *Snyder, supra,* to the facts of this case. Thus the Petition does not call upon this Court to resolve a conflict among the circuits or to decide an important question of federal law which has not yet been, but should be, settled by this Court, but rather to make a finding of fact as to whether or not a $10,000 claim exists as to each member of the purported class. Were this Court to undertake such a task it would conclude on the basis of the argument and evidence we set forth in Section III, *infra,* that the jurisdictional minimum is satisfied as to each member of the purported class. More important, however, is the fact that certiorari is not intended to resolve evidentiary and factual questions of this nature. This is especially true when the Petition seeks the issuance of this Court's writ to review subject matter jurisdiction in a case still pending in the District Court.

As a second and final argument in favor of certiorari in the instant action petitioners state "the prejudice to petitioners of being bound by a decision of the courts lacking in jurisdiction cannot be overstated." (Petition, pp. 11-12.) Petitioners argue that they did not originally file in the federal court, but were removed there on petition by Beech.

Petitioners then assert that once in federal court they were put to the burden of establishing the appropriateness of this purported class action under Rule 23 of the

Federal Rules of Civil Procedure. Petitioners then suggest they were somehow prejudiced by an alleged denial of the "benefit of the procedural rules of the State of California with respect to class actions embodied in California Code of Civil Procedure § 382 and as interpreted by decisions of that State." (Petition, p. 12.)

Petitioners cite this Court to *Daar v. Yellow Cab Co.*, 67 Cal.2d 695, 63 Cal.Rptr. 724, 433 P.2d 732 (1967), and *Vasquez v. Superior Court*, 4 Cal.3d 800, 94 Cal. Rptr. 796, 484 P.2d 964 (1971), apparently for the proposition that the procedural requirements for class adjudication under California law are different than the requirements of Rule 23. Petitioners then state: "Comparing this procedural test of California with that of Federal Rule 23, in particular Rule 23(b)(3), the differences become readily apparent. To be required to meet the muster of Rule 23 in a case properly in Federal Court is one thing. To be subject to its vigorous requirements when not properly in Federal Court is another matter altogether." (Petition, p. 13.)

Petitioners apparently suggest that prejudice exists when one is asked to meet the requirements of Rule 23 in a class action properly removed to federal court. Petitioners argue that had they been permitted to pursue their action in the California state courts, they could have tested the propriety of class adjudication under allegedly less rigorous standards than Rule 23. This argument runs on an erroneous presumption and the question presented is, at best, academic because the class action procedures of the federal rules are utilized by the California courts in determining the propriety of class adjudication. (See, *e.g.*, *LaSala v. American Savings & Loan Ass'n*, 5 Cal.3d 864, 97 Cal.Rptr. 849, 489 P.2d 1113 (1971); *Petherbridge v. Altadena*

Fed. Sav. & Loan Ass'n, 37 Cal.App.3d 193, 112 Cal. Rptr. 144 (1974).)

Accordingly, the criteria established by Rule 23 are exactly the same as those established by the California Supreme Court for the determination of the propriety of class adjudication. Since the California courts would apply the same criteria to this action as would the federal courts under Rule 23, no claim of prejudice can properly be asserted.

III.

The Federal Courts at All Times Had Subject Matter Jurisdiction Over the Instant Action.

It has always been the rule that both punitive and compensatory damages are to be considered in determining whether or not the requisite jurisdictional amount in controversy is present in a given action. (*Bell v. Preferred Life Assur. Soc.*, 320 U.S. 238 (1943).) In the instant action the jurisdictional minimum is satisfied as to each of the named and unnamed plaintiffs. Accordingly, the federal courts at all times had subject matter jurisdiction over the instant action.

Both the petition for removal and the amended complaint allege diversity of citizenship and an amount in controversy in excess of $10,000. The amended complaint alleges that Beech has manufactured "approximately" 15,000 planes of the model types petitioners allege have installed therein 40-gallon unbaffled fuel cells. The amended complaint alleges that the class is composed of all those owners of aircraft having installed therein 40-gallon fuel cells as of the date of the filing of the complaint (June 7, 1971). Thus, the total

population of the class can be no more than the total number of aircraft manufactured by Beech having installed therein 40-gallon unbaffled fuel cells.[9]

The record reflects that Beech has manufactured no more than 6,252 aircraft with 40-gallon unbaffled fuel cells. Accordingly, the allegation of 15,000 class plaintiffs is erroneous and the class can be composed of no more than 6,252 persons. The allegation of a right to $100,000,000 in punitive damages, if divided by the maximum 6,252 purported class members, reveals that each alleged class member's distributive share of said $100,000,000 is $15,993.28, an amount well in excess of the $10,000 jurisdictional minimum.[10]

For the convenience of the Court, we provide the following table which denotes the beginning and ending serial numbers of aircraft eligible for manufacture with optional 40-gallon unbaffled fuel cells. The information compiled herein is to be found in the record made in the District Court and designated on the interlocutory appeal to the Ninth Circuit.[11]

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[9]We say no more than the total number manufactured because manufacture of these aircraft commenced in 1960 (Petition, Appendix B, Finding 9) and it is therefore to be expected that many are no longer in service, that many are foreign owned, and that many, although eligible for optional 40-gallon fuel cells, were manufactured with fuel cells having a lesser capacity.

[10]To determine the amount claimed by each plaintiff, the amount of punitive damages claimed must be augmented by the amount of claimed compensatory damages. In some cases, the alleged compensatory damages are substantial as in the case of petitioner J. Michael Donahoe who claims $7,000 in loss of sales value for his aircraft, *see*, J. Michael Donahoe's Answers to Interrogatories propounded by Defendant Beech Aircraft Corporation.

[11]For evidence that the controversy only concerns aircraft with unbaffled fuel cells, see the affidavit of petitioners' affiant Gerald Sterns [Clk. Tr., p. 1136, lines 19-23]; for evidence of the beginning serial numbers presented herein, see Beech's Answers

Beginning Serialization	Ending Serialization	Net
Bonanza/Debonair Series		
CD388	CD1234	847
CE1	CE289	289
CJ1	CJ30	30
D6562	C9068	2,507
E1	E184	184
Baron/Travel Air Series		
TC1	TC1298	1,298
TD453	TD721	268
TE1	TE767	878
TF1	TF65	65
	TOTAL	6,252

This Court in *St. Paul Mercury Indemnity Co. v. Red Cal Co.*, 303 U.S. 283 (1938), held that where a suit is instituted in a state court and removed to a federal court, there is a strong presumption that plaintiff has not claimed a large amount for the purpose of conferring jurisdiction on the federal courts or that the parties have colluded to that end. Similarly, it has been held in this and other courts that the entire record may be referred to determine the existence or nonexistence of jurisdictional facts supporting federal jurisdiction, *e.g.*,

to Plaintiff's Interrogatories [Clk. Tr., pp. 417-419, lines 24-8]; for evidence of the ending serial numbers presented herein, see Federal Aviation Administration Airworthiness Directive, AD 72-11-2. [Clk. Tr. p. 1383.] The 15,000 aircraft figure found in the complaint is not totally irrational since Beech has, in total, manufactured 14,600 aircraft of the model types identified in the complaint. Of these 14,600 aircraft, 6,252 were eligible for 40-gallon unbaffled fuel cells, 906 were manufactured with 40-gallon baffled fuel cells, and 7,442 with 20 or 25-gallon fuel cells.

Boundurant v. Watson, 103 U.S. 281 (1881); *Ross v. Southern Ry. Co.*, 20 F.Supp. 556 (W.D.S.C. 1937).

The amended complaint herein pleads "that jurisdiction herein is founded on diversity of citizenship between the parties *and the amount in controversy exceeds the sum of $10,000. . . .*" The verified petition for removal filed by Beech pleads essentially the same facts. As we have demonstrated, the membership of the purported class can not exceed 6,252 persons; and, therefore, on the basis of the complaint, the petition for removal and on the facts, it is clear that the federal courts at all times had subject matter jurisdiction in this case. Accordingly, certiorari should be denied.

Conclusion.

This Court has stated that certiorari should not be granted except in cases involving principles, the settlement of which is of importance to the public, as distinguished from those of importance to the parties. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955). It is clear that petitioners do not seek to invoke the jurisdiction of this Court to review principles "the settlement of which is of importance to the public" but rather to avoid the consequences of their very allegation that in the instant action "jurisdiction . . . is founded on diversity of citizenship and the amount in controversy exceeds the sum of $10,000 . . ." Moreover, the granting of a writ of certiorari in this case would only serve to involve the Court in what is essentially a fact finding task.

Accordingly, this Petition for Writ of Certiorari should be denied.

Dated: May 30, 1974.

Respectfully submitted,

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APPENDIX AA.

First Amended Complaint for Damages (Compensatory and Punitive).

United States District Court, Central District of California.

J. Michael Donahoe and Nelson J. MacLeod, Plaintiffs vs. Beech Aircraft Company, a corporation, Defendant. No. 71-1558-MML.

Filed January 5, 1973.

COMES NOW the plaintiffs J. MICHAEL DONAHOE and NELSON J. MacLEOD, in place of and instead of FLETCHER JONES now deceased, on their behalf and on behalf of all others similarly situated, having first obtained the permission of this Court, hereby files this First Amended Complaint for Damages and for cause of action against the defendant BEECH AIRCRAFT COMPANY, a corporation, complains and alleges as follows:

I

That at all times herein mentioned and at the time of the filing of this action the plaintiff J. MICHAEL DONAHOE was a resident and citizen of the State of Oklahoma and the plaintiff NELSON J. MacLEOD was a resident and citizen of the State of Maryland. That the defendant BEECH AIRCRAFT COMPANY was and now is a corporation organized and existing under and by virtue of the laws of Delaware, with a principal place of business in the City of Wichita, State of Kansas and was at all times mentioned doing business in the County of Los Angeles, State of California. That jurisdiction herein is founded on diversity of citizenship between the parties and the amount in

controversy exceeds the sum of $10,000.00 exclusively of any interest, costs and attorneys' fees.

II

That at all times mentioned in the original complaint on file herein entitled FLETCHER JONES v. BEECH AIRCRAFT COMPANY and at the time of filing of said complaint, plaintiff J. MICHAEL DONAHOE was the owner and operator of a 1967 Beechcraft Baron aircraft Model C-55 bearing Serial Number TE-263 and FAA Registration Mark N12MD. That plaintiff NELSON J. MacLEOD was and still is the owner of a 1968 Beechcraft Baron Model B-55 aircraft bearing Serial Number TC-1059 and FAA Registration Mark N7130N. That each of said aircraft bore current Airworthiness Certificates signed by or on behalf of Chester A. Rembleske as authorized managing agent of the defendant BEECH AIRCRAFT COMPANY.

III

That each of the above mentioned aircraft was manufactured by the defendant and incorporating therein at the time of manufacture main fuel cells of 40 gallon capacities. That said 40 gallon fuel cells are common to other aircraft manufactured by the defendant, to wit, the Beechcraft Debonair series, the Beechcraft Bonanza series, the Beechcraft Baron series and the Beechcraft Travelair series aircraft.

IV

Defendants have designed, assembled, manufactured, sold and distributed approximately 9000 Bonanzas and Debonairs and approximately 6000 Barons and Tavelairs which incorporate and utilize the 40 gallon fuel

system hereinabove referred to; said 40 gallon fuel system was and is defective in its design and construction in that under normal operating procedures fuel within the 40 gallon fuel cells, during operation, is caused to move in a spanwise direction uncovering the fuel strainer port within the tank permitting air to enter the fuel system and thus causing an interruption in the operation of the engine and a loss of power to the aircraft. That said defect is identical and common to all of the above described aircraft, including those aircraft owned and operated by plaintiffs herein.

V

Plaintiffs bring this action in place and in stead of FLETCHER JONES who is now deceased. Said action is brought on plaintiffs' behalf and all others similarly situated who owned the above described aircraft at the time of the filing of the initial complaint herein. Plaintiffs herein, by way of this amended complaint, seek to recover damages occasioned by the above described defects, which claim involves common questions of fact and law of interest to many persons residing and using said aircraft throughout the United States and in foreign countries. That the questions of fact and law involved in plaintiffs' claim are typical and common to the entire class. That because of the large numbers of persons involved and because of their location throughout the United States and the world it is impractical to bring all of said persons who are properly members of the class before this honorable court and plaintiffs therefore bring this action not only on their own behalf but also for the benefit of all persons similarly situated. That said plaintiffs can fairly and adequately represent the members of the class.

VI

Prior to the production of each of the BEECH AIRCRAFT COMPANY'S Bonanzas, Debonairs, Barons and Travelairs incorporating and utilizing the aforesaid 40 gallon fuel system, the defendant acting through its authorized representatives, including particularly defendant's employee Chester Rembleske, submitted to the Federal Aviation Administration (then "Agency") of the United States of America, false, misleading and incomplete information in the form of a "Statement of Compliance" that each of said aircraft, including their respective fuel systems, had been tested by the defendant as provided and required by law and were found to comply with the applicable Federal Statutes and Regulations pursuant to which each of said aircraft were type certificated. On the basis of the information thus provided and the information thus not provided, the Federal Aviation Administration issued a type certificate to defendant for each of the model aircraft hereinabove described and a production certificate for the production of each model of said aircraft; had the Federal Aviation Administration been advised as to the defects in said aircraft, all of which were known to defendant, the type certificates and production certificates, thus issued, would not have been issued and could not have been issued as a matter of law.

VII

After obtaining type certification and production certificates on each of the above described aircraft, defendant BEECH AIRCRAFT COMPANY commenced manufacture of said aircraft and equipped each with a 40 gallon fuel system which defendant knew

did not meet the minimum standards under which the type certificate was issued and defendant knew said aircraft were not airworthy as a result; said aircraft were ultimately sold to plaintiffs and to the members class of persons similarly situated with plaintiffs, all of whom relied upon and were justified in relying upon the false and fraudulent representations of defendant that said aircraft, including their respective fuel systems, were airworthy. Plaintiffs and all members of the class further relied on the airworthiness certificate accompanying each and every such aircraft, which certificate was signed by Chester Rembleske for defendant BEECH AIRCRAFT COMPANY and said airworthiness certificate represented the aircraft, including its fuel system, was in fact airworthy; at the time each airworthiness certificate for each aircraft was signed, Chester Rembleske and the members of the Board of Directors of defendant BEECH AIRCRAFT COMPANY, actually knew that said fuel system was defective in its design and construction and that the representations theretofore made with regard to said aircraft and said system and contained and set forth in said airworthiness certificate were false.

VIII

That in addition to the acts described hereinabove, the defendant concealed the existence of said defects from the plaintiffs herein and all members of the class, failed to adequately test and determine the full nature and extent of the fuel starvation problem in said 40 gallon fuel system and wilfully and wantonly failed to modify, repair, alter or change said fuel system in said aircraft.

IX

That the conduct of the defendant was wilful, wanton, grossly negligent, malicious, fraudulent and deceitful as to plaintiffs herein and as to all members of the class as above described. That said wrongful conduct of the defendant entitles plaintiffs herein and all members of the class to punitive damages as against the defendant under the law of whatever jurisdiction this court determines applicable to the wrongful conduct of the defendant, all as more particularly sought hereinbelow.

X

Plaintiffs herein discovered the wrongful conduct of the defendant within a few days following the filing of the class action of FLETCHER JONES when they read in the Wall Street Journal and other national publications of the filing of said action. That up to that time said plaintiffs and members of the class were unaware of the nature and extent of the defects in their aircraft nor were they aware of the wrongful conduct of the defendant herein.

XI

That as a direct and proximate result of the defendant's conduct in the premises, it is necessary for plaintiffs herein to modify and repair the fuel cells contained in their aircraft in order that the fuel system be made airworthy and such modifications and repairs will cost in excess of $800.00. Likewise, it is necessary that each and every member of the class of persons similarly situated, each of whom is required to similarly modify their aircraft, incur the cost of repairs and modifications in an amount in excess of $800.00 per

aircraft. Plaintiffs are informed and believe and therefore allege the actual damages thus sustained by the total membership of the class are in excess of 8.4 million dollars.

XII

That as a direct and proximate result of the defendant's conduct in the premises, plaintiffs and each member of the class shall be entitled to recover punitive damages in the amount of 100 million dollars, plus interest from the date of the purchase of each of said aircraft embraced within the class.

WHEREFORE, plaintiffs pray for judgment against the defendant as follows:

1. For reimbursement to plaintiffs and to each member of the class the sum of $800.00 or such other amount as may be necessary to repair and modify each aircraft,
2. For punitive damages in the amount of 100 million dollars,
3. For costs of suit incurred herein, and
4. For such other and further relief as the Court deems just and proper.

DATED: January 3, 1973

MAGANA & CATHCART and
WALKUP, DOWNING, STERNS & POORE
By: /s/ Daniel C. Cathcart
DANIEL C. CATHCART
Attorneys for Plaintiffs